SUPREME COURT, U. S.

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No. 1066

In the

Supreme Court of the United States

OCTOBER TERM, 1969

CITY OF PHOENIX, ARIZONA, et al.,

Appellant,

vs.

EMILY KOLODZIEJSKI,

Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE CITY OF TULSA, OKLAHOMA, AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the City of Tulsa, a political subdivision of the State of Oklahoma, and is sponsored by the City Attorney of said city, the authorized law officer thereof under Rule 42(4) of the Rules of the Supreme Court of the United States. The nature of the city's interest is that on September 9, 1969, an election was held in said city at which only taxpayers were permitted to vote on questions of authorizing certain bond issues of said city, including $28,100,000 bonds for the purpose of acquir-

ing and constructing extensions and improvements to the waterworks and water supply system of the city, and $16,900,000 bonds for the purpose of constructing and equipping sewage disposal and treatment plants for sanitary sewer purposes, both of which propositions carried, and also $5,500,000 bonds for storm sewer purposes, $9,200,000 bonds for public park and recreation purposes, $1,125,000 bonds for airport purposes, $2,187,000 bonds for museum purposes, $2,400,000 bonds for fire department purposes, $932,000 bonds for public transportation purposes, $285,000 bonds for assembly center purposes, $7,300,000 bonds for municipal theater purposes, $98,000 bonds for city garage purposes, $16,300,000 bonds for an Arkansas River Lakes Public Park Project, and $289,000 bonds for public safety facilities, which last eleven named issues failed to carry. Such an election is required by the Constitution of the State of Oklahoma, (Article 10, Section 27, of said Constitution) to be limited to property taxpaying voters. All of said bonds would be full general obligation bonds of the city, payable from ad valorem property taxes. In view of *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) and *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, decided by this court on June 16, 1969, said bonds cannot be sold because of the fear of prospective purchasers that such bonds will be held void if issued in reliance upon said election, on the ground that it was held in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The city is not able, however, to resubmit the question of the issuance of such bonds to another election at which all qualified electors may vote because of said state constitutional provision and because there is no law in the State of Oklahoma which authorizes any such election.

The city does not take any position as to the merits of the case, but urges that a decision be made promptly because, until such a decision is made, the water and sanitary sewer projects to be financed by the above described bonds, which are essential to the health and welfare of the inhabitants of the City of Tulsa, cannot be started nor can a new election be held whereat all qualified electors may vote on said bonds.

The city believes that the facts and questions of law pertaining to bond issues of cities in Oklahoma cannot be adequately presented by the parties because said parties are involved with questions of Arizona law alone.

STATEMENT

The City of Tulsa, Oklahoma, as *amicus curiae,* adopts the statement of the case appearing in the Statement as to Jurisdiction of the City of Phoenix, Arizona, the Appellant.

SUMMARY OF ARGUMENT

Because of the great public importance of the ability of the City of Tulsa, and all other political subdivisions in states where the constitution or statutes permit only taxpayers or property owners to vote in general obligation bond elections, to proceed with the financing of essential capital improvements, which cannot now be made because of uncertainty as to the application of the principle established by this court in *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647, and *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, a prompt decision of this court is respectfully requested. *Amicus curiae* does not take any position as to whether the decision of the trial court should be affirmed or reversed.

ARGUMENT

The City of Tulsa is now unable to sell $45,000,000 bonds voted for water and sanitary sewerage purposes, because, pursuant to Article X, Section 27 of the Constitution of the State of Oklahoma, said bonds were voted at an election at which only qualified property taxpaying voters were permitted to vote.[1] Said bonds are general obligation

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[1] Most bonds of political subdivisions in Oklahoma are voted under Article X Section 26 or Section 27. The former imposes a debt limit, and permits the issuance of bonds only upon favorable vote of three-fifths of the voters (not just taxpaying voters) voting at an election; the latter permits cities and towns to issue bonds for "public utilities. . . . owned exclusively by such city" without a debt limit upon a favorable vote of a simple majority of the qualified property taxpaying voters. The Oklahoma Supreme Court has held that "public utility" means any public purpose, and that for all purposes except those, such as streets, which are not owned exclusively by the city, bonds should be voted under Section 27. *City of Shawnee* v. *Williamson*, 338 P. 2d 355. Said state constitutional provisions read as follows:

> § 26. Indebtedness of political subdivisions—Assent of voters—Limitation of amount—Annual tax.—Except as herein otherwise provided, no county, city, town, township, school district, or other political corporation, or subdivision of the State, shall be allowed to become indebted, in any manner, or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of three-fifths of the voters thereof, voting at an election, to be held for that purpose, nor in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring

bonds to which the full faith and credit of the City of Tulsa are pledged, and are expressly excluded from the application of the decision of the Supreme Court of the United States in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 which held that the provisions of Louisiana law restricting to taxpayers the right to vote in revenue bond elections violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. However, because the reasoning in the *Cipriano* case and *Kramer* v. *Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, may be held to preclude states from restricting to property owners or taxpayers the right to vote in a general obligation bond election, prospective purchasers of the bonds are not satisfied that, if they should purchase bonds voted at such elections, the bonds will be valid and legally binding upon the City of Tulsa.

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[1] (Continued)

of such indebtedness: Provided, that if a school district has an absolute need therefor, such district may, with the assent of three-fifths of the voters thereof voting at an election to be held for that purpose, incur indebtedness to an amount, including existing indebtedness, in the aggregate exceeding five per centum (5%) but not exceeding ten per centum (10%) of the valuation of the taxable property therein, to be ascertained from the last assessment for State and county purposes previous to the incurring of such indebtedness, for the purpose of acquiring or improving school sites, constructing, repairing, remodeling or equipping buildings, or acquiring school furniture, fixtures or equipment; and such assent to such indebtedness shall be deemed to be a sufficient showing of such absolute need, unless otherwise provided by law. Provided, further, that any county, city, town, school district, or other political corporation, or subdivision of the State, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an

Petitioner is not able to resubmit the propositions for the issuance of the bonds which carried or the bonds which failed to carry to all qualified electors of the city because there is no law which authorizes any such "free-for-all" elections on bond issues of the types here involved, the Constitution of the State of Oklahoma specifically providing that only taxpayers may vote at such an election. The Supreme Court of the State of Oklahoma may later decide whether a determination that the equal protection clause

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[1] (Continued)

annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five (25) years from the time of contracting the same, and provided further that nothing in this Section shall prevent any school district from contracting with certificated personnel for periods extending one (1) year beyond the current fiscal year, under such conditions and limitations as shall be prescribed by law.

§ 27. Indebtedness for purchase, construction or repair of public utilities.—Any incorporated city or town in this State may, by a majority of the qualified property tax paying voters of such city or town, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section twenty-six, for the purpose of purchasing or constructing public utilities, or for repairing the same, to be owned exclusively by such city: Provided, That any such city or town incurring any such indebtedness requiring the assent of the voters as aforesaid, shall have the power to provide for, and, before or at the time of incurring such indebtedness, shall provide for the collection of an annual tax in addition to the other taxes provided for by this Constitution, sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty-five years from the time of contracting the same.

prohibits taxpayer elections for general obligation bonds results in erasing instanter from the state constitution and laws all provisions which restrict to taxpayers the right to vote in such bond elections, leaving untouched the rest of the legal machinery under which bonds can be voted and issued. However, the Oklahoma Supreme Court cannot render any such decision until a final determination is made of the United States constitutional question. Likewise, the Legislature, if called into special session by the governor, cannot determine what, if any, laws it must adopt to provide for the holding of elections on such bonds until such a final United States Constitutional determination is made; if Article X Section 27 of the Oklahoma Constitution is valid, a law authorizing "free-for-all" elections on bonds covered thereby would be futile.

There are now pending in the state Supreme Courts of Arizona,[2] Idaho,[3] Louisiana,[4] Michigan,[5] and Oklahoma[6]

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[2] *School District No. 26 (Bouse Elementary) of Yuma County, Arizona* v. *Strohm et al.* decided originally in Superior Court in and for Yuma County. Trial court dismissed petition for alternative writ of mandamus to compel Board of Supervisors to order sale of general obligation school bonds voted both (1) at taxpayer's election in accordance with Arizona law and (2) at election held on same day in which all qualified electors were permitted to vote on grounds that (1) violated Federal constitution and (2) was not authorized by Arizona law.

[3] *Muench and Taylor* v. *Paine et al,* Supreme Court of Idaho, Number 10522, alternative writ of prohibition granted September 13, 1969, in original proceeding to prevent Board of County Commissioners from issuing general obligation bonds voted May 27 by taxpayers of school district. Defendants required to show cause on or before October 7 and hearing to be set later.

Bogert v. *Kinzer,* #10446, Supreme Court of Idaho, argued September 11, 1969. Originally suit re constitutionality of requirement for ⅔ vote—attention of court drawn to *Cipriano* case.

cases in which the respective courts are being asked to decide on the constitutionality of their respective state constitutional or statutory provisions which restrict to taxpayers the right to vote in general obligation bond elections. There are also numerous cases pending in various

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[4] *Strick Chambers* v. *Road District No. 505 of Tangipahoa Parish, Louisiana, et al.* #36,478 Appeal from 21st Judicial District Court, Parish of Tangipahoa, which held that plaintiff could not obtain injunction against issuance of general obligation bonds voted at taxpayers' election held on July 7, 1969 because suit was not brought within 60 day period prescribed by Article XIV Section 14(n) of Louisiana Constitution. Affirmed by Louisiana Supreme Court December 15, 1969. Rehearing period expires December 29.

[5] *Detroit Edison Co. et al.* v. *East China Township School District.* Rehearing of case involving annexation of school district and assumption of indebtedness pursuant to election held several years ago at which only taxpayers were permitted to vote.

[6] *Tom Settle* v. *Board of County Commissioners of Muskogee County, Oklahoma,* Number 43812, original action in Supreme Court of Oklahoma to enjoin issue of limited tax industrial development bonds under Article X, Section 35 of Oklahoma Constitution.

Tom Settle v. *City of Muskogee,* Number 43842, original action to enjoin issuance of general obligation bonds voted under Article X, Section 27 of the Oklahoma Constitution at election held on May 6, 1969.

On December 23, 1969, the Oklahoma Supreme Court refused to enjoin the issuance of the bonds at issue in the aforementioned two cases. The rehearing period expires January 2, 1970.

lower federal and state courts.[7] Without prompt guidance from this court, those state supreme courts and other federal courts may or may not reach the same result as this court will reach, or the same result that some of the other courts will reach. If a prompt decision is not made by this court, one or more state supreme courts or lower federal courts may hand down decisions, whether upholding or voiding the state constitutional requirement, in reliance upon which bonds issued by political subdivisions in the state involved will be purchased by investors. If two or more state supreme courts or lower federal courts should reach different conclusions, if bonds of political subdivisions of one state should be issued, having been authorized at "free-for-all" elections in reliance on such a court decision that all qualified electors must be allowed to vote, and if bonds of political subdivisions of another

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[7] *Hobbs* v. *Police Jury of Morehouse Parish* Civ. #14,836, U.S. Dist. Court, W. Dist. of Louisiana, Monroe Division—petition filed July 24, 1969, for three judge court and declaratory relief re general law and particular taxpayers' general obligation bond election, held June 24, 1969, injunction and other relief.

Frank T. Stewart et al. v. *The Parish School Board of the Parish of St. Charles et al.* Civ. #69-2818, U.S. Dist. Court, E. Dist. of Louisiana, New Orleans Division—petition filed November 21, 1969 for three judge court and declaratory relief re general law and particular taxpayers' general obligation bond elections held September 23, 1969, injunction and other relief.

Slette v. *White Pine S.D. Bond Election Judges et al.* #10160 2nd Judicial District Court, Latah County, Idaho. Memorandum decision September 3, 1969, dismissing complaint. Holds bond elections cannot legally be held in Idaho.

Handy v. *Parish School Board of Parish of Acadia,* Fifteenth Judicial District Court of Louisiana, No. 31, 923, filed October 2, 1969—non-taxpayer's petition to enjoin issuance of general obligation bonds and for declaratory and other relief. Bonds were voted at taxpayers' election April 22, 1969, and sixty day contest period started running May 9, 1969. Decision for defendant on November 19, 1969 in trial court.

state should be issued, having been voted at taxpayers' elections in reliance upon a decision of the supreme court of that state or of a lower federal court upholding such elections, then any decision which this court could render on the question might necessarily result in one set of bonds being held illegal and void, even though in the hands of innocent investors and bona fide purchasers.

The test of the validity of a restriction on the right to vote established by the Supreme Court of the United States is as follows, citing from the *Kramer* case: ". . . if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the court must determine whether the exclusions are necessary to promote a compelling state interest." This was made applicable to revenue bond elections only by the *Cipriano* case.

' (Continued)

Rankin v. *E. Bat. Rouge Parish School Board*, Dismissed by trial court September 15, 1969—now on appeal in First Circuit Court of Appeal. Same bonds covered in—

Andrieux v. *Parish School Board of East Baton Rouge*, #50160 where Louisiana Supreme Court held on October 23, 1969 that general obligation bonds voted by taxpayers only on February 25, 1969, cannot be contested because contest period expired before June 16, 1969, and before commencement of this suit.

Carter v. *Fort Worth Ind. S.D. & City of Fort Worth* #57283-C Dist. Ct. of Tarrant County, Texas, 67th Dist. Petition filed for declaratory relief re general law.

Anderson v. *Ogden City et al.* in the District Court of Weber County, Utah Civil No. 50717. Suit to enjoin holding taxpayers' election on revenue bonds called for February 17, 1970 and declaratory relief.

Cypert v. *Washington County School District et al.* in the Fifth Judicial District Court in and for Washington County, Utah, Civil No. 4146. Suit to enjoin sale of general obligation school bonds voted at taxpayers' election on May 27, 1969 and declaratory relief.

A decision affirming the trial court could amount to a determination that a constitutional or statutory provision applying to all general obligation bond elections is void if it restricts participation to taxpaying electors. A decision reversing the trial court could give guidance to that court, to other federal district courts and to the courts of the various states where litigation is now pending as to the type of bond elections wherein the franchise may be restricted.

CONCLUSION

The City of Tulsa as *Amicus Curiae* takes no position on the merits of the case but, because of the urgent need to proceed with projects for which bonds were voted by the taxpaying voters of said city, urges that whatever decision is reached be rendered promptly so that said city can soon either sell said bonds or attempt to resubmit the propositions for their issuance to all qualified voters of the city.

Respectfully submitted,

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CERTIFICATE

I, the undersigned counsel for Amicus Curiae, City of Tulsa, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this 30th day of December 1969

Phillip N. Haller